

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DOUGLAS L. KIMZEY, an individual,

Plaintiff,

v.

YELP INC., a Delaware corporation,

Defendant.

Case No.: 2:13-cv-01734-RAJ

DEFENDANT YELP INC.'S REPLY IN
SUPPORT OF MOTION TO STRIKE AND
TO DISMISS

NOTE ON MOTION CALENDAR:
January 10, 2014

Nothing in Plaintiff's Complaint (Dkt. # 1) or Response (Dkt. # 16) amounts to a plausible allegation that Yelp authored any of the content underlying Plaintiff's claims. Thus, a straightforward application of Section 230(c)(1) of the Communications Decency Act ("CDA 230") rules requires dismissal of Plaintiff's lawsuit. In attempting to salvage his claims, Plaintiff makes two additional arguments: (1) that the availability of Yelp reviews through Google's search engine somehow undermines CDA 230 protection; and (2) that Yelp's offers of advertising somehow amount to extortion. Response, ¶¶ 2-8; ¶¶ 9-10. Plaintiff's first argument does not change the CDA 230 analysis, and the second fails to satisfy the minimal pleading standards required by the Federal Rules. Because it is clear that a third-party user of Yelp's free website (Sarah K.) generated the content at issue here, and CDA 230 precludes Yelp from being

1 held liable for this content, the Court should strike and dismiss Plaintiff's Complaint. Further,
2 because Plaintiff cannot amend his Complaint to allege a cause of action that overcomes CDA
3 230's bar, the Court should dismiss the Complaint with prejudice.

4 **A. Plaintiff Does Not Contest Application of the Anti-SLAPP Elements or that a Third**
5 **Party Submitted the Review**

6 Plaintiff's Response does not dispute that the Review is a statement in connection with an
7 issue of public concern or that Yelp's Motion otherwise satisfies the anti-SLAPP standards.
8 Plaintiff therefore has the burden of proving that he can make out a prima facie case.
9 RCW 4.24.525(4)(b). He fails to do this.

10 Yelp's Motion highlighted the pleading deficiencies in Plaintiff's Complaint. The Motion
11 also attached credible evidence making clear that a third party created the Review underlying the
12 Complaint. MacBean Decl. (Dkt # 11), Ex. A. This is evident from the face of the Review itself,
13 which was expressly authored by Yelp user Sarah K. Plaintiff implicitly concedes that the
14 Review was written by a Yelp user (*i.e.*, Sarah K.)—Plaintiff's Response contains *no* discussion
15 of, or argument regarding, authorship of the Review or whether Sarah K. authored the Review.
16 The closest Plaintiff comes to disputing authorship of the Review is in paragraph 17 of his
17 Response where he argues that his locksmith business "does not use 'Technicians' . . . [and] does
18 not use the pricing as asserted." Response, ¶ 17. Even liberally construed, however, this is
19 merely an argument that the Review was somehow inaccurate, but not that it was authored by
20 someone other than Sarah K. There is certainly no credible allegation that Yelp participated in
21 any way in authoring the Review. Thus, there are no plausible allegations that can deprive Yelp
22 of CDA 230's broad immunity. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F.
23 Supp. 2d 544, 548 (E.D. Va. 2008), *aff'd*, 591 F.3d 250 (4th Cir. 2009) ("The complaint must,
24 however, plead sufficient facts to allow a court, drawing on 'judicial experience and common
25 sense,' to infer 'more than the mere possibility of misconduct.'") (citing *Ashcroft v. Iqbal*, 555
26 U.S. 662, 668 (2009)). This is enough to resolve the Motion in Yelp's favor.

1 The “one star” rating submitted by Sarah K. as part of the Review is likewise content
2 submitted by a third party and is covered by CDA 230’s broad immunity. Levitt v. Yelp! Inc.,
3 No. C-10-1321 EMC; No. C-10-2351 EMC, 2011 U.S. Dist. LEXIS 124082, at *22 (finding
4 Gentry “persuasive,” and holding that aggregate star rating on Yelp is protected under CDA
5 230). Moreover, as argued in Yelp’s Motion (pp. 20-21), the “star rating” is a statement of
6 opinion and therefore not actionable under First Amendment standards. Browne v. Avvo, Inc.,
7 525 F. Supp. 2d 1249, 1250 (W.D. Wash. 2007). Plaintiff’s Response does not offer any
8 arguments to the contrary and if anything confirms that the star rating is a matter of opinion. *See*
9 Response, ¶ 2 (“‘one star’ . . . meaning ‘the worst’”).

10 Plaintiff’s two remaining contentions are: (1) Yelp “caused to appear” the content on
11 Google and this was somehow a promotion of some sort and (2) the Review is part of some
12 complex scheme on Yelp’s part. Neither of these specious arguments is sufficient to overcome
13 Yelp’s CDA 230 immunity.¹

14 **B. That the Review Was Available Through Third-Party Search Engines is Irrelevant**

15 Plaintiff repeatedly argues that Yelp “caused to appear” the Review on Google and this
16 somehow renders Yelp legally responsible for the content. *See* Response, ¶ 2; ¶ 5; ¶ 7. There is
17 no dispute that reviews and other content on Yelp’s Site may be displayed not just on the Site,
18 but also through other means including “a variety of third-party search engines.” *See* Sollitto
19 Decl. (Dkt. # 12) ¶ 20. Indeed, the utility of the Site and the free speech rights of its users are
20 enhanced by members of the public being able to find consumer reviews in a variety of ways,
21 including through search engines.² The precise mechanism for how this occurs is inaccurately
22

23 ¹ Plaintiff also alludes to the placement of advertisements by third parties, who Plaintiff describes as
24 “competitors.” Response, ¶ 19. This does not in any way affect the CDA 230 analysis. Goddard v. Google, Inc., 640
F. Supp. 2d 1193, 1201 (N.D. Cal. 2009) (rejecting attempt to hold Google liable for third party advertisements).

25 ² Kimzey repeatedly refers to the Review as made available through Google as a “commercial promotion”. *See*
26 Response, ¶¶ 5-8. While Kimzey does not offer any specifics beyond attaching this label, it is clear from the face of
the Review that it does not promote Yelp in any way, and availability of the Review through third-party search
engines does not change this. While Kimzey does not make a credible argument to this effect, and the Court thus
need not reach this issue, the Review does not constitute commercial speech under First Amendment standards.

described by Plaintiff but is in any event irrelevant—the case law makes clear that as “information provided by another information content provider,” CDA 230 protects Yelp’s publication of user reviews and ratings. This robust protection is preserved regardless of the precise means or scope of publication, and even if the content is made available through third-party websites or other methods of further distribution to the public. *See Prickett v. Infousa, Inc.*, 561 F. Supp. 2d 646, 651 (E.D. Tex. 2006) (providing user generated content “to other businesses who pay for the license to reproduce the information in their own mediums” does not result in loss of CDA 230 protection). As noted by the California Court of Appeal in *Barrett v. Rosenthal*, in enacting CDA 230, Congress did away with the traditional distinction between “distributors” and “publishers” for providers and users of “interactive computer services”. *Barrett v. Rosenthal*, 40 Cal. 4th 33, 77-78 (2006) (email list operator who forwarded third party’s email to entire email list protected by CDA 230). Therefore, even if Yelp took active steps to make user reviews available through third-party search engines, websites, or other mediums, this would not in any way affect its entitlement to CDA 230 immunity or otherwise somehow transmute third-party created content into Yelp created content. *Id.*; *see also Phan v. Pham*, 182 Cal. App. 4th 323, 328 (2010) (claim against person who forwarded email authored by third party precluded by CDA 230).

C. Plaintiff’s Vague Allegations Regarding Advertising Sales are Insufficient

Plaintiff also implies that Yelp would alter or delete the Review in exchange for advertising with Yelp, but his allegations are impermissibly vague on this point. Response, ¶ 9.³ But Plaintiff has not stated a claim for extortion, and his arguments do not describe the threats of

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (defining commercial speech as “speech which does ‘no more than propose a commercial transaction.’”).

³ These insinuations are also false, and Plaintiff appears to be parroting failed allegations from a different, rejected case. *See generally, Levitt v. Yelp! Inc.*, No. C-10-1321 EMC; No. C-10-2351 EMC, 2011 U.S. Dist. LEXIS 124082 (N.D. Cal. Oct. 26, 2011) (dismissing extortion-related claims against Yelp and finding both that claims lacked plausibility, and that Yelp was protected from such claims under CDA 230).

1 fear that would be required for such a claim. Sosa v. DIRECTV, Inc., 437 F.3d 923, 939 (9th Cir.
2 2006) (noting that extortion claim requires “actual or threatened force, violence, or fear”); United
3 States v. Pascucci, 943 F.2d 1032, 1036 (9th Cir. 1991) (“transmittal of a threat . . . is an integral
4 element of federal extortion”). Kimzey describes in hypothetical terms the “obvious expectation”
5 that Yelp would remove content if he advertised, but he does not point to any statements that
6 Yelp supposedly made that would lead to this unfounded expectation, or why purchasing
7 advertising from Yelp would lead to any result other than Yelp’s display of the purchased
8 advertising. Kimzey’s baseless speculation regarding Yelp’s supposed motivations in publishing
9 the Review strain credulity and are wholly unsupported by any plausible allegations. To the
10 contrary, as explained in Vince Sollitto’s declaration, Yelp’s publication of user reviews and
11 implementation of its recommendation software involve classic exercises of editorial discretion,
12 and CDA 230 therefore protects them. Sollitto Decl. ¶ 18. Further, as Mr. Sollitto’s declaration,
13 the Site, and Yelp’s other materials make abundantly clear, advertisers cannot “delete, change, or
14 re-order” reviews. Sollitto Decl. ¶ 16. There is nothing in Plaintiff’s submissions to the contrary.
15 Accordingly, Plaintiff’s baseless allegations regarding Yelp’s supposed advertising pitch are
16 insufficient to salvage Plaintiff’s claims.

17 CONCLUSION

18 Plaintiff’s lawsuit is a clear attempt to penalize Yelp for actions taken in the public
19 interest, namely operating an online public forum and making available through that forum a
20 third-party consumer review regarding Plaintiff’s business. Neither the Complaint nor Plaintiff’s
21 Response contain any plausible facts showing that Yelp created or developed the content in
22 question. Accordingly, CDA 230 clearly bars Plaintiff’s claims. Plaintiff’s attempts to plead
23 around Yelp’s CDA 230 immunity fail. For the reasons set forth in Yelp’s Motion and in this
24 Reply, Plaintiff’s Complaint should be dismissed with prejudice.

25 Dated and respectfully submitted, this 10th day of January, 2014.
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1 **CERTIFICATE OF SERVICE**

2 I certify that on January 10, 2014, I filed the foregoing **Reply in Support of Motion to**
3 **Strike and to Dismiss** using the Court's CM/ECF system which will send notification of such
4 filing to Plaintiff (who is registered with the Court's CM/ECF system). I also caused a copy of
5 the document to be sent via U.S. Mail to Plaintiff's address listed on the Complaint.

6 DATED: January 10, 2014.

7 *s/ Venkat Balasubramani*
8 Venkat Balasubramani, WSBA # 28269
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